FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 17 1941
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 100.

ILLINOIS NATURAL GAS COMPANY. APPELLANT,

VS.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY AND ILLINOIS COMMERCE COMMISSION, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLANT.

GLENN W. CLARK,
RUSSELL VOERTMAN,
Kansas City, Missouri,
ALBERT C. SCHLIPF,
Springfield, Illinois,
Counsel for Appellant.

INDEX

Subject Index

Opinion Below 1

Jurisdiction 2

Statement of the Case 2

Specification of Errors to Be Urged 9

Summary of Argument 10

Argument—

I. Appellant is engaged in interstate commerce 14

II. The Illinois Commerce Commission has no jurisdiction under the Illinois Commerce Commission Act over appellant's activities 32

III. The Illinois Commerce Commission's order is repugnant to and in conflict with the commerce clause of the Federal Constitution 36

IV. The order of the Iilinois Commerce Commission is repugnant to and in conflict with the Natural Gas Act 42

Conclusion 58

Appendix "A" 61

Appendix "B" 63

Table of Cases

Alabama & Vicksburg Ry. Co. vs. Jackson & Eastern Ry. Co., 271 U. S. 246, 70 L. Ed. 928 47

Billings Gas Company, In re, 35 P. U. R. (N. S.) 321 29

Carson Petroleum Co. vs. Vial, 279 U. S. 99, 73 L. Ed. 626 26

Central of Georgia R. Co. vs. Murphey, 196 U. S. 194, 49 L. Ed. 444 39

Chicago, R. I. & P. R. Co. vs. Hardwick Farmers Elev. Co., 226 U. S. 426, 57 L. Ed. 284 53
East Ohio Gas Company vs. Tax Commission, 283 U. S. 465, 75 L. Ed. 1171 17
Erie R. R. Co. vs. N. Y., 233 U. S. 671, 58 L. Ed. 1149 53
Hines vs. Davidowitz, 85 L. Ed. 366 44
Houston & T. C. R. vs. Mayes, 201 U. S. 322, 50 L. Ed. 772 39
Kansas City Structural Steel Co. vs. State of Arkansas, 269 U. S. 150, 70 L. Ed. 204 14
Kentucky Natural Gas Corporation vs. Public Service Commission of Kentucky et al., 119 F. 2d 417, affirming 28 Fed. Supp. 509 49
McNeill vs. Southern Ry. Co., 202 U. S. 543, 50 L. Ed. 1142 37
Minnesota Rate Cases, 230 U. S. 352, 57 L. Ed. 1511 37
Missouri ex rel. Barrett vs. Kansas Natural Gas Co., 265 U. S. 298, 68 L. Ed. 1027 ..... 20, 22, 41
Missouri Pacific Railway Co. vs. Stroud, 267 U. S. 404, 69 L. Ed. 683 55
National Labor Relations Board vs. Central Missouri Telephone Company, 115 F. 2d 563 22
O'Brien vs. Western Union Telegraph Co., 113 F. 2d 539 48
Panhandle Eastern Pipe Line Company vs. Public Service Commission et al., 93 S. W. 2d 675 31
Pennsylvania vs. West Virginia, 262 U. S. 553, 67 L. Ed. 1117 39
People ex rel. N. Y. C. R. Co. vs. Public Service Commission, 233 N. Y. 113, 135 N. E. 195 52
Peoples Natural Gas Co. vs. Public Service Commission, 270 U. S. 552, 70 L. Ed. 726 16
Public Utilities Commission vs. Attleboro Steam & Elec. Co., 273 U. S. 83, 71 L. Ed. 549 28
Public Utilities Commission vs. Landon, 249 U. S. 236, 63 L. Ed. 577 20
Southern Natural Gas Co. vs. Alabama, 301 U. S. 148, 81 L. Ed. 970 21
State Tax Commission vs. Interstate Gas Company, 284 U. S. 41, 76 L. Ed. 156 27

St. Louis Connecting R. R. Co. vs. Blumberg, 325 Ill. 387, 156 N. E. 298 34
The Daniel Ball, 77 U. S. 557, 19 L. Ed. 999 22
United States vs. Erie R. R. Co., 280 U. S. 98, 74 L. Ed. 187 24
United States vs. Rock Royal Co-op., 307 U. S. 533, 83 L. Ed. 1446 25
Western Oil Ref. Co. vs. Lipscomb, 244 U. S. 346, 61 L. Ed. 1181 26
Western Union Telegraph Co. vs. Foster, 247 U. S. 105, 62 L. Ed. 1006 28

CODE

Judicial Code, as amended, U. S. C. A., Title 28, Section 344a 2

COURT RULE

Rule 12, Paragraph 1, Supreme Court Rules 2

ACTS

Illinois Commerce Commission Act (Illinois Public Utilities Act), Chapter 111 2/3, page 2492, Illinois Revised Statutes, 1939 ..... 9, 10, 34, 61
Illinois Public Utilities Act, Section 90 ..... 32, 34, 35
Natural Gas Act, 52 Stat. at L. 821-833, 15 U. S. C. A. 717-717w 10, 43, 51, 56, 63
Natural Gas Act, Section 1a 43
Natural Gas Act, Section 1b 30, 45
Natural Gas Act, Sections 2(6), 2(7) 46

CONSTITUTION

Constitution of United States, Article I, Section 8, Clause 3 ..... 8, 9

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 100.

ILLINOIS NATURAL GAS COMPANY, APPELLANT,

VS.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY AND ILLINOIS COMMERCE COMMISSION, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLANT.

OPINION BELOW.

The opinion of the Supreme Court of the State of Illinois is reported in 375 Ill. 634, 32 N. E. 2d 157, under the style of *The Central Illinois Public Service Company et al., Appellees,* v. *The Illinois Natural Gas Company, Appellant.*

JURISDICTION.

Pursuant to Paragraph 1 of Rule 12 of the rules of this Court, a jurisdictional statement was duly filed and presented to the Court below at the time of allowance of appeal, disclosing the grounds on which the jurisdiction of this Court is invoked, the statute which is believed to sustain the jurisdiction of this Court being Section 237, as amended, of the Judicial Code, U. S. C. A., Title 28, Section 344a.

After docketing the case and filing the record with the Clerk of this Court, Appellees filed statements of matters which, according to their contentions, make against the jurisdiction of this Court and at the same time filed their motions to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of Illinois.

Appellant duly filed its brief in opposition to said statements and motions and on October 13, 1941, this Court ordered that further consideration of the question of jurisdiction and of said motions be postponed to the hearing of the case on its merits.

STATEMENT OF THE CASE.

On May 22, 1939, appellee Central Illinois Public Service Company filed its application (in the nature of a complaint) with Illinois Commerce Commission, alleging that its pipe line from the Illinois-Indiana state line near Paris, Illinois, to and serving Paris, Mattoon, Charleston and Effingham, Illinois, was inadequate to assure dependable service to all of said towns and petitioning Illinois Commerce Commission to require appellant to furnish natural gas to it at or near Mattoon, Illinois (R. 18-21), which town is located at the approximate center of its aforesaid interconnected distribution system, a distance

of about twenty miles from appellant's source of supply (the interstate pipe line system of Panhandle Eastern Pipe Line Company) for all of said appellee's requirements in said group of towns (R. 38).

In its answer (response) to said application, appellant alleged its business to be interstate commerce, recited the enactment of the Natural Gas Act effective June 21, 1938, challenged the jurisdiction of the Illinois Commerce Commission on the ground that appellant's business and operations constituted interstate commerce and that the Federal Power Commission had exclusive jurisdiction over appellant and the subject matter of the proceeding and prayed dismissal of the application of Central Illinois Public Service Company for lack of such jurisdiction (R. 21-25).

Appellant, an Illinois corporation, is a wholly owned subsidiary of Panhandle Eastern Pipe Line Company, a Delaware corporation* (R. 21). Panhandle Eastern Pipe Line Company owns a natural gas transmission system which extends from the Amarillo gas field in the Panhandle area of the State of Texas and from the Hugoton gas field in southwestern Kansas and Oklahoma, through the States of Oklahoma, Kansas, Missouri and Illinois, to a point near Dana, Indiana, adjacent to the Illinois-Indiana state line. It produces and purchases natural gas at said source of supply, transports the same through its main transmission line and through lateral or branch lines extending therefrom to the various points of delivery where said natural gas is delivered to its various customers (R. 21-22, 27) (See Map, R. 66A).

Panhandle Eastern Pipe Line Company sells and delivers natural gas along the route of its main transmis-

---

*This statement and several others hereinafter made are based in part upon appellant's answer before Illinois Commerce Commission, which answer was received as evidence in the case, by stipulation, as a part of the testimony of witness Neuner (R. 26).

sion line to gas distributing utilities engaged in distributing natural gas at retail to the public, to a number of large industrial customers and to appellant at the points of connection of appellant's transmission lines with the main transmission line of Panhandle Eastern Pipe Line Company (R. 28).

At Dana, Indiana, Panhandle Eastern Pipe Line Company's main transmission line connects with the natural gas transmission line of Michigan Gas Transmission Corporation, from which point the latter transports natural gas delivered to it at said point for transportation and delivery on behalf of Panhandle Eastern Pipe Line Company to the distributing company in Detroit, Michigan (R. 28).

Appellant owns natural gas transmission lines in the State of Illinois, all of which are connected to the main transmission line of its parent company, Panhandle Eastern Pipe Line Company (R. 27, 66A). Appellant's business consists principally of the purchase of natural gas at the points where its transmission lines connect with the Panhandle Eastern Pipe Line Company's main transmission line and the transportation and delivery of such gas through these lateral transmission lines to gas distributing utilities in the State of Illinois (R. 28). These deliveries are made through town border measuring stations at or near the city limits of the cities where the distributing plants are located (R. 28-29). In addition to making deliveries to distributing utilities, appellant serves four or five industrial customers directly, these customers being located along its Quincy line (R. 29). Appellant purchases its natural gas requirements from Panhandle Eastern Pipe Line Company under a written contract between said companies dated June 30, 1938, under which contract Panhandle Eastern Pipe Line Company is obligated to sell and deliver to appellant all of the natural gas required for appellant's present and future customers (R. 22, 30, 74).

Sales of natural gas by Panhandle Eastern Pipe Line Company are made under contracts executed either in Kansas City, Missouri, or New York. Pressure in that company's main transmission line varies from a discharge pressure at a compressor station of around four hundred fifty pounds per square inch to a suction pressure at the next station of around two hundred twenty five to two hundred fifty pounds per square inch (R. 29).

Prior to the time that either Panhandle Eastern Pipe Line Company or appellant actually commence serving their respective customers, Panhandle Eastern Pipe Line Company has knowledge of the approximate date of first delivery, the estimated daily demands of each customer and the pertinent data regarding the peak loads of each customer. This is necessary in order that Panhandle Eastern Pipe Line Company may provide for sufficient connections in the field and introduce into its main transmission line sufficient quantities of natural gas to serve each of such customers (R. 22, 30).

In packing the main transmission line of Panhandle Eastern Pipe Line Company, its pressure dispatcher, after consulting weather reports and customer estimates, estimates in advance each day the requirements of all of its customers and those of appellant. There is continuous transportation of the quantities of natural gas necessary to fulfill the requirements of all such customers (R. 22, 31).

The natural gas required by the customers of appellant is transported continuously by Panhandle Eastern Pipe Line Company from its sources of supply to the various points of connection between its main transmission line and the lateral transmission lines of appellant where the gas is delivered to appellant at main line pressure (R. 22, 31).

The appellant, without breaking the continuity of transportation, reduces the pressure of the gas as it enters its transmission lines to the extent necessary to effect the

most economical transportation to its customers (R. 22-23, 31, 33). The pressure carried by appellant in its several transmission lines is from a low of thirty eight pounds per square inch in one line to a high of one hundred seventy three pounds per square inch in another line (R. 44, 66). The pressure carried in appellant's several lines depends upon the length and size of the particular line and the market requirements of the customers served therefrom (R. 31).

Deliveries are made by appellant from these lines to the several distributing companies at pressures ranging from fifteen pounds per square inch to ninety one pounds per square inch (R. 44, 66). In no case is gas delivered by appellant at usable pressure. The distributing company or direct industrial customer effects further reduction in pressure (R. 31). The average pressure at which distributing utilities distribute natural gas is 3.47 ounces per square inch (R. 47).

From the sources of supply of Panhandle Eastern Pipe Line Company to the points of delivery of appellant to its customers, the gas is first carried by Panhandle Eastern Pipe Line Company and then by appellant, continuously, without unnecessary treatment, without break in transportation, and without storage, intermediate or otherwise (R. 23, 31). The described manner of effecting transportation and delivery to appellant's customers is the daily normal and contemplated course of operations and, in a practical sense, the required quantities of gas are appropriated to the various customers of appellant from the time the gas leaves the ground until delivery thereof has been effected (R. 23, 31-32).

Appellee Central Illinois Public Service Company, an Illinois corporation, is a gas distributing utility in the State of Illinois, operating under the jurisdiction of the Illinois Commerce Commission and selling natural gas at retail in various cities and communities in the State of Illinois, among which are Paris, Charleston, Mattoon and

Effingham, which towns it serves through an interconnecting distribution system (R. 34, 35, 36). It purchases natural gas for resale in said towns at the Illinois-Indiana state line where its pipe line system connects with the pipe line of Universal Gas Company, which company receives its gas from Kentucky Natural Gas Company. The latter company receives its gas from sources in the State of Kentucky and from the pipe line system of Panhandle Eastern Pipe Line Company (R. 36, 42, 43-44).

The contract between appellee Central Illinois Public Service Company and Universal Gas Company, or its predecessor, had been disapproved by Illinois Commerce Commission and said appellee was purchasing gas from Universal Gas Company on a month to month basis (R. 36, 37-38, 70). Said appellee deemed its pipe line from the Illinois-Indiana state line near Paris, Illinois, to and serving Paris, Mattoon, Charleston and Effingham to be inadequate to assure dependable service to all of said towns, but considered that an adequate supply could be obtained if appellant were required to construct a pipe line from the main transmission line of Panhandle Eastern Pipe Line Company to appellee's distribution system at a point near Mattoon, Illinois, which is located at the approximate center of said distribution system serving said towns (R. 37, 38). Appellant was unwilling to construct a pipe line and render service without first procuring a certificate of convenience and necessity therefor from the Federal Power Commission (R. 39, 64).

Prior to the institution of the proceedings before Illinois Commerce Commission, appellant and its predecessor, Panhandle Illinois Pipe Line Company, which also was a wholly owned subsidiary of Panhandle Eastern Pipe Line Company, had professed to be public utilities under the Illinois Commerce Commission Act, had submitted to the orders, rules and regulations of the Illinois Commerce Commission, and had operated under certificates of convenience and necessity granted by and under

rate schedules approved by and filed with said Commission (R. 23, 34, 88). After the enactment of the Natural Gas Act, appellant had also filed its rate schedules with Federal Power Commission (R. 33).

On November 30, 1939, Illinois Commerce Commission entered its order holding that the operations and business of appellant were intrastate and in no sense interstate in character and directing appellant to make such installations and connections with appellee Central Illinois Public Service Company's distribution system at or near the City of Mattoon, Illinois, as shall be adequate for supplying said appellee with its natural gas requirements in said distribution system (R. 47).

On December 28, 1939, appellant filed its petition for rehearing with Illinois Commerce Commission in which it again challenged the jurisdiction of said Commission, on the ground that appellant's business was interstate in character and therefore subject to the exclusive jurisdiction of Federal Power Commission under the Natural Gas Act, assailed the order of Illinois Commerce Commission and the statute under which it was made as invalid as applied to appellant, on the ground that it interfered with and placed a burden upon interstate commerce in contravention of Article I, Section 8, Clause 3, of the Constitution of the United States and challenged the conclusions of law of Illinois Commerce Commission to the effect that appellant's business constituted intrastate commerce. Said motion for rehearing was denied without written opinion (R. 58-59).

Appeal was perfected by appellant to the Circuit Court of Coles County, Illinois, where review was had on the record made in the proceedings before the Illinois Commerce Commission (R. 59, 68). Said Court, on August 2, 1940, affirmed the order of the Illinois Commerce Commission without written opinion (R. 68).

Appellant duly perfected its appeal from the judgment of the Circuit Court of Coles County, Illinois, to

the Supreme Court of Illinois, where it again urged, among others, the same errors as set forth in its petition for rehearing before the Illinois Commerce Commission (R. 68-69). On February 18, 1941, the Supreme Court of Illinois affirmed the judgment of the Circuit Court of Coles County, holding that the business and operations of appellant constituted intrastate commerce and that therefore the Illinois Commerce Commission had jurisdiction to enter its order of November 30, 1939 (R. 108).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

1. The Supreme Court of the State of Illinois erred in holding and deciding that the assumption of jurisdiction by Illinois Commerce Commission, the order of the Illinois Commerce Commission and the Illinois Commerce Commission Act of June 29, 1921, being Chapter 111 2/3, Illinois Revised Statutes, 1939, and particularly Section 50 thereof, as applied to appellant, and under the supposed authority of which statute said order was made, were valid and constitutional although said order requires appellant to subject itself and its activities to the jurisdiction of Illinois Commerce Commission, to render natural gas service to appellee Central Illinois Public Service Company for its requirements for resale in the cities of Mattoon, Charleston, Paris and Effingham, Illinois, and communities intermediate thereof, and to construct and extend a natural gas pipe line and facilities for a distance of approximately twenty miles for such purposes, because said order and said statute as so construed and applied are unconstitutional and void, in that they are repugnant to the Constitution of the United States and particularly Article I, Section 8, Clause 3, thereof.

2. The Supreme Court of the State of Illinois erred in upholding as valid the assumption of jurisdiction by the Illinois Commerce Commission, the order of the Illinois

Commerce Commission, and the Illinois Commerce Commission Act of June 29, 1921, being Chapter 111 2/3, Illinois Revised Statutes, 1939, and particularly Section 50 thereof, under the purported authority of which said order was made, which, as construed and applied to appellant by said court, subject appellant and its activities to the jurisdiction of the Illinois Commerce Commission and require appellant to extend its natural gas pipe line and facilities for a distance of approximately twenty miles and to render natural gas service for the natural gas requirements of several cities and communities in the State of Illinois, because said order and statute, as so construed and applied to appellant, are illegal and void in that they are repugnant to and in direct conflict with the Natural Gas Act, 52 Stat. at L. 821-33, U. S. C. A., Title 15, Secs. 717-717w.

3. The Supreme Court of Illinois erred in deciding and holding that the activities of appellant in transporting, selling, and delivering natural gas in the State of Illinois constitute intrastate commerce rather than interstate commerce and that said order of the Illinois Commerce Commission, as applied to appellant and its activities, is not repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States of America or to the Natural Gas Act, 52 Stat. at L. 821-33, Title 15, U. S. C. A. Secs. 717-717w.

SUMMARY OF ARGUMENT.

I.

Appellant contends that the order of Illinois Commerce Commission which directed appellant to construct and extend natural gas transmission facilities a distance of approximately twenty miles and to sell and deliver to Central Illinois Public Service Company natural gas for resale in several cities and communities in Illinois,

and the statute under which said order was made, are unconstitutional and void as applied to appellant for several reasons, all of which stem from appellant's assertion that its business and activities in the State of Illinois constitute interstate commerce. The soundness of appellant's various reasons for the invalidity of this order depends upon a determination by this Court that its business and activities are interstate in character.

Appellant asserts that its transmission and delivery of natural gas at wholesale to gas distributing utilities and to a few large industries in Illinois constitute interstate commerce in that the natural gas which is delivered daily to such customers, from the time it leaves the Texas and Kansas sources of supply of appellant's parent company, Panhandle Eastern Pipe Line Company (to the main gas transmission line of which company appellant's Illinois transmission lines connect and from which its supply of gas is obtained) until the time it is delivered to appellant's wholesale customers, is in the course of continuous high pressure transportation and, in the normal contemplated course of business of appellant and Panhandle Eastern Pipe Line Company, is in practical effect appropriated to such customers.

Appellant contends that by reason of the interstate character of its business, the order of Illinois Commerce Commission is void because:

II.

The Illinois Commerce Commission Act, the provisions of which govern the functions of Illinois Commerce Commission, expressly denies to that Commission any jurisdiction or authority to make and enter the order herein complained of in that the Act expressly exempts interstate commerce from the scope or field of its application. Under these circumstances it seems obvious that the exercise by Illinois Commerce Commission of unconferred regulatory powers with respect to the busi-

ness of appellant and the prior submission thereto by appellant and its predecessor, Panhandle Illinois Pipe Line Company, were due to a mutual misconception of the legal nature of the business activities of those companies, but irrespective of whether the order and such prior submission to regulation arose from mutual mistake or otherwise, jurisdiction of the interstate subject matter could have been conferred upon Illinois Commerce Commission only through valid legislative enactment. That which was essentially interstate commerce could not be changed to intrastate commerce by mere prior submission to an unlawful assertion of jurisdiction and authority.

III.

The order violates the Commerce Clause of the Constitution of the United States because it imposes and constitutes a direct, forbidden and proscribed burden upon and interference with interstate commerce.

If the Illinois Commerce Commission can order appellant to construct and extend facilities some twenty miles and to supply appellee, Central Illinois Public Service Company, with natural gas, then it could do so as to other localities and in favor of other distributing companies, thereby impairing the ability of both appellant and appellant's parent company, Panhandle Eastern Pipe Line Company, to meet their respective preexisting contractual obligations to sell and deliver natural gas, a commodity produced only in nature and limited in quantity, to other distributing companies supplied by appellant or its parent company.

The transportation and delivery of natural gas to appellant's customers constitutes an unbroken chain fundamentally interstate from beginning to end and the paramount interest is not local, but national, admitting of and requiring national uniform regulation, which is necessary to preserve equality of treatment among the several communities and states which might be affected.

IV.

The order of Illinois Commerce Commission is repugnant to and in direct conflict with an Act of Congress, the Natural Gas Act, under which the Congress of the United States vested in Federal Power Commission the regulatory powers which Illinois Commerce Commission has attempted to arrogate unto itself.

Appellant asserts that even if it were conceded that the order of the Illinois Commerce Commission is of such a nature and character that it might, with propriety, have been made prior to any national legislation upon the subject of interstate transportation and sale of natural gas, nevertheless such order is, by virtue of the enactment of the Natural Gas Act, rendered unconstitutional and void, whether such Act is regarded as a complete scheme of regulation, admitting of no conflicting, interfering, curtailing or complementing state regulations whatever or whether such Act be regarded as only a partial occupation of the field of regulation of interstate transportation and sale of natural gas.

ARGUMENT.

I.

Appellant Is Engaged in Interstate Commerce.

The Supreme Court of Illinois held, upon undisputed facts, that appellant was engaged in intrastate commerce; that the order of the Illinois Commerce Commission affected only intrastate commerce and that the local interest was paramount and the national interest indirect and of minor importance (R. 108).

What constitutes interstate commerce remains a mixed question of law and fact for the determination of this Court.* *Kansas City Structural Steel Co.* v. *State of Arkansas*, 269 U. S. 150, 70 L. Ed. 204. Appellant contends that the uncontroverted facts established in the hearing before the Illinois Commerce Commission conclusively demonstrate the interstate character of appellant's business.

The decision of the State Supreme Court discloses that the Court appeared to nourish the notion that appellant's activities in the State of Illinois are identical with those of a purely local distributing company selling gas at retail under franchise directly to the ultimate domestic consumer. The decision speaks of the treatment and division of the large compressed volume of gas as if the reduction of pressure incidental to the economical transportation in appellant's lines was identical to the manifold expansion of gas which takes place in the local service lines of a local distributing company delivering gas to its customers at the burner tips under pressures varying

*Wherever the expression "this Court" is used, it is intended thereby to refer to the Supreme Court of the United States.

from three to four ounces. The decision strives to differentiate the character of appellant's business from that of companies carrying greater pressures in their transmission lines by professing to see a similarity in the pressures maintained by appellant in its lines to those trifling and nearly static pressures maintained by local distributing companies engaged in the direct delivery of gas at the burner tip of the ultimate domestic consumer. The analogy drawn by the Court is not substantiated by the undisputed facts, and by reason of the improper analogy drawn by the Court, appellant asserts that it has improperly applied principles of law heretofore enunciated by this Court to a state of facts utterly different from the facts within the contemplation of this Court at the times the principles were first laid down.

Appellant contends that none of the cases relied upon by the State Court in arriving at its conclusion that appellant was engaged solely in intrastate commerce will, on the facts involved in any one of them, justify the Court's conclusion that appellant's activities are in harmony with the particular activities characterized by this Court in those cases as intrastate in character. Appellant, in fact, places great reliance for support of its own contentions upon most of the very cases relied upon by the State Court.

Properly applying the decisions relied upon by the State Court to the undisputed facts as to appellant's activities in Illinois, it is evident that the conclusion drawn by the State Court is erroneous, and the interstate character of appellant's business is at once apparent. The precedents relied upon by the State Court obviously do not justify the State Court's conclusion for the reason that the principles of law set forth and the factual situations present in those precedents regarded by the State Court as such persuasive authorities in favor of the sustention of the Illinois Commerce Commission's authority in the premises, far from supporting such conclusion, rather require a diametrically opposite one.

A comparison of the facts in the case of *Peoples Natural Gas Co.* v. *Public Service Comm.*, 270 U. S. 552, 70 L. Ed. 726, with those in the present case reveals a striking, if not complete, similarity between the character of appellant's business and that of the Peoples Company. The Peoples Natural Gas Company was incorporated under the laws of Pennsylvania and was engaged in producing, purchasing, transporting by pipe line and selling natural gas. About two-thirds of its gas supply, which it transported and sold, was purchased from a producing company in West Virginia, the pipe lines of the producing company being laid from the producing company's wells in West Virginia to the boundary line between Pennsylvania and West Virginia, at which point the producing company's lines connected with the pipe line transmission system of the Peoples Company, which transmission lines in turn ran to Pittsburgh, Johnstown and other Pennsylvania cities and boroughs, to which the Peoples Company sold gas. The gas coming from West Virginia was transported in a continuous stream from the places of production in West Virginia to those of consumption in Pennsylvania. At the state boundary between Pennsylvania and West Virginia, at the point at which the respective transmission lines of the Peoples Company and the West Virginia producing company connected, the gas passed through a large meter and that point of connection was treated as the point of delivery for all gas delivered by the West Virginia producing company to the Peoples Company. At Johnstown, Pennsylvania, the Peoples Company sold gas to an independent company having a local franchise for the distribution and sale at retail of natural gas to ultimate domestic consumers in Johnstown. The gas sold and delivered by the Peoples Company to the Johnstown Company for resale by the latter to the ultimate domestic consumer in Johnstown was sold under a contract under which the Peoples Company reserved a right of termination, which right the Peoples Company sought to exercise. The Public Service Commission of

the State of Pennsylvania, upon application by the Johnstown Company ordered the Peoples Company to continue supplying natural gas to the Johnstown Company for resale to consumers in that city, irrespective of the reserved privilege of termination contained in the aforementioned contract. Upon a challenge of the order's validity, this Court said:

> "As respects the West Virginia gas, we are of the opinion, in view of its continuous transportation from the places of production in one state to those of consumption in the other, and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business. *Western U. Teleg. Co.* v. *Foster*, 247 U. S. 105, 112, 113, 62 L. Ed. 1006, 1015, 1016, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 245, 63 L. Ed. 577, 586, P. U. R. 1919C, 834, 39 Sup. Ct. Rep. 268; *Pennsylvania Gas Co.* v. *Public Serv. Commission*, 252 U. S. 23, 28, 64 L. Ed. 434, 441, P. U. R. 1920E, 18, 40 Sup. Ct. Rep. 279; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 280, 281, 66 L. Ed. 234, 238, 239, 42 Sup. Ct. Rep. 105; *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 67 L. Ed. 1117, 32 A. L. R. 300, 43 Sup. Ct. Rep. 658; *Binderup* v. *Pathe Exch.*, 263 U. S. 291, 309, 68 L. Ed. 308, 316, 44 Sup. Ct. Rep. 96; *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. Ed. 1027, 44 Sup. Ct. Rep. 544; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. Rep. 653; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 69 L. Ed. 909, 45 Sup. Ct. Rep. 481."

The State Court's decision placed much emphasis upon the case of *East Ohio Gas Company* v. *Tax Commis-*

sion, 283 U. S. 465, 75 L. Ed. 1171. Appellant likewise enlists the support of the decision of this Court in the East Ohio Gas Company case. That part of the business of the East Ohio Gas Company which was held by this Court to be intrastate commerce is analogous only, however, to that engaged in by the independent local distributing companies to which appellant sells gas in wholesale quantities for resale in the respective communities being served by such local distributing companies. That part of the business of the East Ohio Company, which was held by this Court to constitute interstate commerce, is analogous to the business transacted by appellant. The transportation of gas from the state boundary by the East Ohio Gas Company, at which point the gas transmission lines of the East Ohio Gas Company connected with those of an out-state producing company, to the point of connection with the East Ohio Gas Company's local distribution systems, may very aptly be compared with appellant's transportation of gas from the point of connection between appellant's transmission lines in the State of Illinois with the admittedly interstate transmission line of appellant's parent company, Panhandle Eastern Pipe Line Company, to the local distributing companies to which appellant sells gas in wholesale quantities for resale to the ultimate domestic consumer in the communities served by the local distributing companies. Of such transportation, this Court said in the East Ohio case:

> "The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that state. The mere fact that title or the custody of the gas passes while it is en route from state to state is not determinative of the question where interstate commerce ends."

The decision of the State Court disregarded the more obvious analogy to be drawn from the East Ohio Gas

Company case and fixed rather upon that part of the East Ohio Gas Company's business which consisted purely of local distribution systems as best exemplifying the character of appellant's activities. That part of this Court's decision, which most appealed to the State Court, read:

> "But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumer's premises. So segregated, the gas in such service lines and pipes remains in readiness or moves onward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package after shipment in interstate commerce in order that its contents may be treated, prepared for sale and sold at retail."

The language so approvingly cited by the State Court is wholly inapropos so far as appellant's business is concerned. For example, appellant does not "relieve nearly all the pressure put upon" the gas; the volume of the gas in appellant's pipe lines is not "expanded to many times" what it was in the line of Panhandle Eastern Pipe Line Company; the gas is not divided in appellant's pipe lines into "many thousand relatively tiny streams"; the gas in appellant's pipe lines does not "remain in readiness or move forward to serve as needed" (R. 29, 31, 44, 66). All these things may very appropriately be said of the gas once it has been delivered by appellant to the independent local gas distributing companies operating under franchises and engaged in distributing gas at retail at the burner tip directly to the domestic consumer. The effort of the State Court to assimilate appellant's business activities to that part of the business carried on by East Ohio Gas Company after delivery of the gas into its local supply mains merits serious challenge.

The State Court's decision concedes that both *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. Ed. 1027, and *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 63 L. Ed. 577, sustain the proposition that the transportation of gas through pipe lines from one state to another for sale to distributing companies is interstate commerce, but illogically concludes that appellant's business is, nevertheless, intrastate because the sale and delivery of gas to the ultimate domestic consumers at the burner tips by local companies operating under special franchise was held by this Court in those cases to be intrastate. Appellant does not quarrel with this Court's decision in either of the aforementioned cases, but appellant does take exception to the applicability to appellant's activities of the language quoted from these two cases by the State Court as establishing that the appellant is engaged in interstate commerce. The whole opinion of the State Court appears to have been bottomed upon a false premise—that appellant's business and that of a purely local distributing company operating in a community under special franchise and selling gas at retail at the burner tip to the ultimate consumer are one and the same, and that, therefore, any decision of this Court declaring such purely local distribution to be intrastate in character is authority for the conclusion that appellant's business is likewise intrastate in character—in utter disregard of a complete dissimilarity between appellant's activities and those of a purely local distributing company.

With respect to the transportation of gas by a pipe line company which delivered gas from other states to local distributing companies within the State of Kansas, this Court said, in *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 63 L. Ed. 577:

> "That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that, as part of such commerce, the receivers might sell

and deliver gas so transported to local distributing companies free from unreasonable interference by the state. *American Exp. Co.* v. *Iowa,* 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217, 56 L. Ed. 738, 32 Sup. Ct. Rep. 442."

In *Southern Natural Gas Co.* v. *Alabama,* 301 U. S. 148, 81 L. Ed. 970, also relied upon by appellees and the State Court, this Court held that the sale of natural gas transported by the Southern Natural Gas Company from the State of Louisiana to an industrial customer in Alabama constituted intrastate commerce. The facts with respect to the sale and delivery of gas to the industrial customer were peculiar and distinct from those in any other reported decision, in that the Southern Natural Gas Company had contracted with the industrial customer to maintain service lines in the customer's plants in order that the gas might be furnished in a manner suited to the consumers' needs, and was serving gas in that manner on orders received from time to time. This Court, in arriving at the conclusion that the sale and delivery of gas to the industrial customer by the Southern Natural Gas Company was intrastate in character, placed much emphasis upon the circumstance that the Southern Natural Gas Company did not simply install metering stations for measuring the amount of the gas delivered, but established service lines running to certain plants of the customer. By reason of the installation of the several service lines serving and connecting the different plants, and by reason of the treatment of the gas and the manner of service thereof this Court held that the Southern Natural Gas Company had effectively established a local activity analogous to the service to ultimate domestic consumers in the East Ohio Gas Company case. The facts are thus clearly distinguishable from those in this case. The applicability to appellant of the principles enunciated

by this Court in the case of *Missouri* v. *Kansas Natural Gas Company* and other similar cases expressly reapproved by this Court in the Southern Natural Gas Company decision, remains unaffected. No contention appears to have been made that the Southern Natural Gas Company was engaged in intrastate commerce insofar as the sales to three local distributing companies were concerned.

A fairly recent decision of the United States Circuit Court of Appeals for the Eighth Circuit presents a partial parallel to the situation of appellant. In *National Labor Relations Board* v. *Central Missouri Telephone Company*, 115 F. 2d 563, the defendant (Respondent on appeal) assailed the jurisdiction of the National Labor Relations Board, contending that it was engaged solely in intrastate business. The facts appear with sufficient clarity in the opinion to make a repetition of them unnecessary. The Appellate Court said:

> "Respondent urged that it was in itself an intrastate carrier and that the activities were not, therefore, subject to the regulatory power of the Federal Government. Stated otherwise, the argument is that a local telephone company engaged mainly in the transmission of intrastate communication over lines lying wholly within the limits of one state cannot be held to be an instrument of interstate commerce by the mere fact that it effects the transmission of interstate messages to and from points served by it by connecting its lines to those of an interstate carrier. * * * These contentions clearly appear to have been foreclosed to respondent by decisions of the Supreme Court and by at least one decision of this Court."

The Court in the Central Missouri Telephone case then proceeded to cite numerous decisions of this Court upholding the application of the National Labor Relations Act in similar situations. Great emphasis was placed, too, upon the language of this Court in *The Daniel Ball*, 77 U. S. 557, 19 L. Ed. 999, wherein this Court said:

> "So far as she was employed in the transportation of goods destined for other states or goods brought from without the limits of Michigan and destined to go places within that state, she was engaged in commerce between the states and however limited that commerce may have been, she was, so far as it went, subject to the regulation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent to which each agency acts in that transportation, it is subject to the regulation of Congress."

The principles governing the determination of the character of appellant's business, whether interstate or intrastate, have, of course, often been iterated and reiterated. The application of accepted principles is the crux of the problem. The primary features distinguishing the appellant's activities in Illinois in the matter of transportation and sale of natural gas from those of companies engaged directly in the transportation of natural gas across state lines are those of change of custody, change of title and the circumstance that appellant's role in the transportation of gas from the Texas and Kansas gas fields is limited to the transportation and delivery of such natural gas within the State of Illinois. The ultimate wholesale customer to which appellant transports and delivers natural gas is, however, within the contemplation of both appellant and its parent company, Panhandle Eastern Pipe Line Company, at the time the transmission lines of the parent company are "packed" at the gas fields with the daily requirements of all of appellant's customers, as well as all of Panhandle Eastern Pipe Line Company's customers, for the long trip north and east, the continuity of which is never interrupted,

discontinued or broken in any sense (R. 22-23, 30, 31) which would cause a cubic foot of the gas in the pipe lines of the appellant in Illinois to be any less in interstate commerce than the same cubic foot as it swirled through the main line of Panhandle Eastern Pipe Line Company and the connecting line of Michigan Gas Transmission Corporation anywhere between the Panhandle of Texas and the City of Detroit, Michigan.

In *United States* v. *Erie R. R. Co.*, 280 U. S. 98, 74 L. Ed. 187, wood pulp was shipped from Europe by a foreign mill to a broker in Hoboken, New Jersey, who had placed an order for the pulp with the foreign mill on behalf of a company at Garfield, New Jersey; the bales of pulp ultimately to be delivered to the Garfield Company constituted only a small part of the entire shipment of pulp to Hoboken. The contract for the pulp was made directly between the Garfield company and the Hoboken broker; no foreign mill was mentioned in the contract, although the mill was advised of the prospective customer's name at the time the broker submitted the order secured from the Garfield company. The foreign mill shipped directly to the broker, who, it appears, paid the mill as soon as he was advised of the shipment. The question involved was the proper rate to apply to the carriage from Hoboken to Garfield all within the state of New Jersey. The carrier contended that the foreign shipment was distinct from the subsequent shipment by the broker from Hoboken to Garfield of the smaller quantity, that the carriage from Hoboken to Garfield was made under a new and local bill of lading, that the title to the pulp did not pass to the company until the broker arranged at the Hoboken dock for shipment of the specific load to Garfield, and that, therefore, the rail movement from Hoboken to Garfield was an independent intrastate transaction. To this contention, this Court replied:

> "But the nature of the shipment is not dependent upon the question when or to whom the title

passes. *Pennsylvania R. R. Co.* v. *Clark Bros. Coal Mining Co.*, 238 U. S. 456, 59 L. Ed. 1406. It is determined by the essential character of the commerce. *Baltimore & O. S. W. R. Co.* v. *Settle*, 260 U. S. 166, 67 L. Ed. 189. It is not affected by the fact that the transaction is initiated or completed under a local bill of lading which is wholly intrastate (citing numerous cases), or by the fact that there may be a detention before or after the shipment on the local bill of lading (*Carson Pet. Co.* v. *Vial*, 279 U. S. 95, 73 L. Ed. 626). The findings of the Commission that the broker acts only as agent and that from the time that the pulp is put aboard the steamer, there is continued intent that it should be transported to Garfield ought to have been accepted by the District Court as conclusive since there was ample evidence to sustain it. * * * The rail transportation is in fact a part of the foreign commerce."

As in the Erie Railroad Company case, Panhandle Eastern Pipe Line Company, as the original transporter of natural gas, intends and has within its contemplation transportation to the final local destination—whether it be the independent local distributing companies in Illinois purchasing gas from appellant for resale to the ultimate consumers or whether it be the independent local distributing companies purchasing directly from Panhandle Eastern Pipe Line Company. The Illinois carriage of the gas by the appellant constitutes an integral and essential part of the whole interstate transportation thereof from the Texas and Kansas gas fields (R. 22-23, 30, 31).

The converse of the situation, insofar as the point of origin of the commodity is concerned, is exemplified by the case of *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 83 L. Ed. 1446, wherein sales of milk were made by farmers to local dairies where products were bought for use beyond the state in which the sale and purchase of milk was made. In disposing of the argument that the sale of milk by the farmers to the dairies was a purely

local transaction, fully completed before any interstate commerce began, the Court said:

> "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements violates the Tenth Amendment. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the Federal Power to regulate inspection of the whole. Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause."

Illustrating the same principle, but going even beyond the Erie Railroad Company case on the facts, is the case of *Carson Petroleum Co.* v. *Vial*, 279 U. S. 99, 73 L. Ed. 626, in which oil shipped in interstate commerce to large storage tanks at St. Rose, Louisiana, was held and stored for ultimate export until a ship arrived or until a sufficient quantity of oil was accumulated to make up a cargo. While the shipper always had orders on hand in excess of the quantity of oil at St. Rose, the oil in the storage tanks was not segregated or assigned or destined to any particular cargo or shipment abroad. The Court in characterizing the stored oil as oil in interstate commerce under the circumstances said, quoting approvingly from *Western Oil Ref. Co.* v. *Lipscomb*, 244 U. S. 346, 61 L. Ed. 1181:

> "Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers and where commodities are in fact destined from one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder."

Unlike the Carson Petroleum Company, the appellant does not even temporarily store any of the gas it receives from the interstate pipe line of its parent company, Panhandle Eastern Pipe Line Company (R. 23). All gas sold and delivered by appellant moves in a continuous and unbroken flow from the Texas and Kansas gas fields through the pipe lines of Panhandle Eastern Pipe Line Company and those of appellant to the independent local distributing companies (R. 31) operating under franchises in various cities and towns throughout Illinois wherein the gas purchased from appellant is resold at retail to the ultimate domestic consumer (R. 28-29). Appellant carries natural gas through its transmission lines at pressures varying from thirty-eight pounds per square inch as a minimum to one hundred seventy-three pounds per square inch as a maximum (R. 44-45, 66). For purposes of delivery, these pressures are further reduced by appellant at the moment of such delivery of the natural gas to the local distributing company or to the industrial customer, as the case may be (R. 31, 44-45, 66). While reduction of pressure may, with propriety, be considered as one of the many factors upon which the characterization of transportation of natural gas as interstate or intrastate may turn, in all of the cases where a reduction of pressure has been treated as a decisive factor, the sort and extent of reduction of pressure referred to therein was that found only in the gas mains of purely local utility companies selling gas at retail to the ultimate consumer. Illustrative of this Court's view of the degree of importance to be attributed to a mere reduction of pressure is its decision in the case of *State Tax Commission* v. *Interstate Gas Company*, 284 U. S. 41, 76 L. Ed. 156, in which it said:

> "Distributing companies tap the plaintiff's pipes near Natchez and the town of Woodville. The gas withdrawn by the distributors is measured by a thermometer and by a meter furnished by plaintiff, which is the only way in which it can be measured. The

> pressure of the gas is reduced by plaintiff before it passes into the purchaser's hands. The work done by plaintiff is done upon the flowing gas to help the delivery and seems to us plainly to be incident to the interstate commerce between Louisiana and Mississippi. The plaintiff simply transports the gas and delivers at wholesale, not otherwise worked over than to make it ready for delivery to the independent parties that dispose of it by retail."

The State Court, in its opinion, professed to see no relevancy in the decision of this Court in *Public Utilities Commission* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 71 L. Ed. 549, wherein a Rhode Island company sold electricity to a Massachusetts firm and made delivery at the state line, as to which transaction this Court said:

> "It is conceded rightly that the sale of electric current by the Narragansett Company to the Attleboro Company is a transaction in interstate commerce notwithstanding the fact that the current is delivered at the state line. The transmission of electric current from one state to another, like that of gas, is interstate commerce * * * and its essential character is not affected by a passing of custody and title at the state boundary not arresting the continuous transmission to the intended destination."

On principle the Attleboro case would appear to be indistinguishable from the present case and would seem to require a conclusion quite opposed to that of the State Court.

The decision of this Court in *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 62 L. Ed. 1006, appears particularly apropos as applied to the relevant facts in the present case. In that case a State Commission sought to regulate interstate telegraph quotations of the New York Stock Exchange by compelling the Telegraph Company to furnish to one broker the service being furnished to others. This Court said:

"* * * It is enough that, in our opinion, the transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices, and that the interference with it was of a kind not permitted to the states. The supposed analogy that has prevailed is that of a receiver of a package breaking bulk and selling at will in retail trade. But it appears to us misleading. We also think it unimportant that the contracts between the Exchange and the telegraph companies emphasize the element of *quasi* sale for a lump sum and leave it to the interest of the telegraph companies to find subscribers. Neither that nor the intervention of an operator, or of another company, are in the least degree conclusive. Unlike the case of breaking bulk for subsequently determined retail sales, in these the ultimate recipients are determined before the message starts, and have been accepted as the contemplated recipients by the Exchange. It does not matter if they have no contract with the Exchange, directly. It does not matter that if the telegraph companies did not deliver to any given one the Exchange could not complain. If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from Exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond."

* * * * * * *

"It is admitted that the transmission from New York to Massachusetts by the telegraph company was interstate commerce. If so, it continued such until it reached 'the point where the parties originally intended that the movement should finally end.' "

The Federal Power Commission, under and pursuant to the Natural Gas Act, has asserted jurisdiction over and control of the activities of appellant upon the theory that appellant is engaged in the transportation of natural gas in interstate commerce and the selling of natural gas in interstate commerce for resale, within the meaning of the federal Act (R. 33, 67). In *In re Billings Gas Company*, 35 P. U. R. (N. S.) 321, the Federal Power Commission held, upon a state of facts practically identical

with those in the present case, that the Billings Gas Company, although confining its entire business within the boundary of one single state, as in the case of appellant, was engaged in interstate commerce. The Commission said:

> "The Ohio Oil Company produces and gathers natural gas in the State of Wyoming, transports the same from the termini of the gathering lines to the Wyoming-Montana state lines and thence sells and delivers gas to Billings Gas Company, which in turn transports the same through a transportation pipe line to Billings, Montana, and to other cities and towns in the state where it is resold for ultimate public consumption. The flow of natural gas through the interconnected facilities of the Ohio Oil Company and the Billings Gas Company to point of local distribution in Montana is a continuous transportation of natural gas in interstate commerce. Both the Ohio Oil Company and the Billings Gas Company are engaged in such transportation and, therefore, come within the definition of natural gas companies in the Natural Gas Act and are not within the exemption of Section 1b, *supra*."

It is interesting to note that the State Court in its decision held that appellant's activities fell within the exemption of Section 1b of the Natural Gas Act, although the activities of appellant in the State of Illinois did not differ one jot from the activities of the Billings Gas Company in the State of Montana in the Federal Power Commission's decision wherein the exemption extended by Section 1 of the Act was held to be inapplicable because the business of the Billings Gas Company was interstate in character.

From the foregoing decisions, it would appear that appellant, in transporting, selling at wholesale, and delivering in Illinois, natural gas produced in Texas and Kansas, and received by appellant from the interstate pipe line of its parent company, Panhandle Eastern Pipe Line Company, is engaged in interstate commerce. The

reduction in pressure, the change of title and change of custody, occurring as the gas is fed into appellant's pipe lines in Illinois, directly from the main gas transmission pipe line of Panhandle Eastern Pipe Line Company, in no wise interrupt or break or bring the interstate transportation of the gas to an end.

In this connection it is interesting to note that in the State of Missouri, Panhandle Eastern Pipe Line Company, appellant's parent company, owns not only the main transmission line, but also the various lateral or branch lines which are used to convey gas to the several utility distributing companies and industrial consumers to which it transports and sells natural gas in that state and that the manner of transporting and effecting delivery of the gas through such main and lateral lines from the sources of supply of said gas to such customers in the State of Missouri, including reductions in pressure and all other matters of operation, is identical with the joint operations of Panhandle Eastern Pipe Line Company and appellant, its subsidiary, in effecting the transportation and delivery to appellant's customers in the State of Illinois (R. 32). The Supreme Court of Missouri, in the case of *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission et al.*, 93 S. W. 2d 675, held that the transportation of natural gas through Panhandle Eastern Pipe Line Company's main transmission line and the transportation and delivery thereof through the lateral or branch lines were interstate in character and free from state regulation. We assume that appellees would not contend that Panhandle Eastern Pipe Line Company's activities in the State of Missouri were intrastate in character and if this assumption is correct, it is clear that if appellees are to draw any legal distinction between appellant's activities in Illinois and Panhandle Eastern Pipe Line Company's activities in Missouri, they must place their sole reliance upon the remaining circumstances of separate ownership of appellant's property in Illinois and the passing of title and custody of gas en route, none of which appears to be of

importance if the rule is to be followed that what is interstate commerce is to be determined by practical considerations based upon actual facts and the normal course of business rather than upon technical legal concepts, title and niceties of form.

The steady flow of the stream of gas through the combined facilities of appellant and its parent company to the points of destination contemplated by both parties when the gas is first set in motion, hundreds of miles distant, presents a complete and integrated picture, having all the essential earmarks of interstate commerce. The State Court's decision that appellant's business is purely local and intrastate in character finds itself wholly unsupported by the authorities, even those upon which the State Court leans for support, and the validity of the Illinois Commerce Commission's order must, therefore, be resolved in the light of the propriety of its application to a company—the appellant—engaged in the interstate transportation, sale and delivery of natural gas in Illinois.

II.

The Illinois Commerce Commission Has No Jurisdiction under the Illinois Commerce Commission Act Over Appellant's Activities.

If appellant is engaged in interstate commerce, as appellant asserts, the very language of the Illinois Commerce Commission Act itself (Sometimes referred to as the Illinois Public Utilities Act), under which the Illinois Commerce Commission exists and functions, denies to the Illinois Commerce Commission any jurisdiction or authority to enter the order herein contested by appellant. Section 90 of the Act provides as follows:

> "90. ACT NOT APPLICABLE TO INTERSTATE COMMERCE. Neither this Act nor any provision thereof shall apply or be construed to apply to commerce with

foreign nations or commerce among the several states of this Union, except when specifically so stated, and insofar as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress and the decisions of the Supreme Court of the United States."

It appears obvious from this language that not only did the Illinois legislature intend to forestall, upon the part of the Illinois Commerce Commission, the imposition of any unconstitutional burdens upon or regulation of interstate commerce in contravention of the Commerce Clause of the Constitution of the United States, acts of Congress and the decisions of the Supreme Court of the United States, but also to forestall any and all action by the Illinois Commerce Commission involving interstate commerce, whether unconstitutionally burdensome or not, unless authority for such action was specifically granted in the Act. If this were not so, it appears that there would be no valid reason for the inclusion in Section 90 of the Act of the language "except when specifically so stated." If the legislature intended that the Act should apply to interstate activities, there would appear to have been no occasion for the inclusion of the above quoted words. the only reasonable effect of which is to restrict the application of the Act, and the power and authority of the Illinois Commerce Commission thereunder, to matters purely intrastate in character except when the Act itself otherwise specifically states, and even in this exceptional situation, only to the extent that would not cause the Illinois Commerce Commission to collide with the Constitution of the United States, acts of Congress or decisions of the Supreme Court of the United States.

We do not find language in the Act from which it would appear that the interstate activities of appellant were to be subject, in the matter of compulsory extension of facilities and rendition of service, to the same liabilities and duties as those of a purely intrastate public

utility. Nor do we find any language in the Act whereby Section 50 of the Act (Appendix "A"), under which the Illinois Commerce Commission purported to act in issuing the order herein resisted, is made "specifically" applicable to interstate commerce. Absent Section 90 of the Act, appellee might have contended that Section 50 applied to both intrastate and interstate activities alike, subject only to the superior authority of the Federal Constitution and acts of Congress, but in the face of the restrictive language contained in Section 90, it appears that the Illinois Commerce Commission has usurped authority intended to be withdrawn from it by the Act itself.

While appellant does not relent from its position that the order of the Illinois Commerce Commission imposes an unconstitutional burden upon and regulation of appellant's interstate activities, appellant does assert that, even if the order of the Illinois Commerce Commission would not impose such a burden upon appellant's interstate activities or constitute such a regulation of its interstate activities as to be unconstitutional, the order, nevertheless, is invalid for the reason that the Illinois Commerce Commission has assumed jurisdiction over activities, which, by the express language of the Act, are intended to be free of regulation by the Illinois Commerce Commission. As was so aptly said by the Supreme Court of the *State of Illinois in St. Louis Connecting R. R. Co.* v. *Blumberg*, 325 Ill. 387, 156 N. E. 298:

> "If the right of way here sought to be condemned were for the use of intrastate railway, then a different question might arise as to appellant's right to invoke the sovereign power, as such railways are subject to the Illinois Commerce Commission, while interstate railways are expressly excepted from its control by Paragraph 109, Chapter 111A of Callaghan's Statutes."*

---

*Section 90 of the Illinois Commerce Commission Act.

Moreover, no contention has ever been made by appellee that appellant would be subject to the Illinois Commerce Commission, at least as respects the subject matter of the order herein resisted, if appellant were engaged in interstate commerce, appellee's sole contention being, not that the order imposes no unconstitutional burden upon or regulation of interstate commerce or that it only indirectly and constitutionally burdens such commerce, but that, as the State Court said, such order "affects only intrastate commerce" and that appellant is engaged only in intrastate commerce and therefore subject to the order.

Jurisdiction of the subject matter—regulation of interstate commerce, even in a constitutional sense—having been expressly withdrawn from the Illinois Commerce Commission by the provisions of the Illinois Commerce Commission Act, it may be pertinent to note here that appellant could not be said to have conferred such jurisdiction upon the Illinois Commerce Commission by filing its rate schedules with said commission and requesting and receiving from it certificates of convenience and necessity. Appellant's activities in Illinois could not, it seems, make intrastate that which was and is essentially interstate in law and fact.

It seems apparent, in view of Section 90 of the Act, that the assumption by Illinois Commerce Commission of unconferred regulatory powers with respect to the business of appellant and the submission thereto by appellant and its predecessor, Panhandle Illinois Pipe Line Company, were due to a mutual misconception of the legal nature of the activities of appellant and its predecessor in Illinois. This mutual mistake could not, of course, confer jurisdiction of the interstate subject matter upon Illinois Commerce Commission or change an essentially interstate course of activities into an intrastate one.

III.

The Illinois Commerce Commission's Order Is Repugnant to and in Conflict with the Commerce Clause of the Federal Constitution.

If appellant is engaged in interstate commerce, as asserted by it, the question then arises as to whether the order of the Illinois Commerce Commission has such a direct and immediate effect upon appellant's activities as to contravene the Commerce Clause of the Federal Constitution. Appellant concedes that not every interference or burden imposed by a state upon interstate commerce is proscribed by the Federal Constitution, but it does maintain that the character of the burden and interference of the order of the Illinois Commerce Commission imposed upon appellant's interstate activities is so direct and immediate in its consequences, aside from any consideration of the propriety of the order under the Natural Gas Act, as to render it unconstitutional and void.

If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of federal legislation. Thus, prior to the enactment of the Natural Gas Act, the question of the validity of the order of the Illinois Commerce Commission would have turned upon whether it imposed such a direct burden upon appellant as to render it unconstitutional under the Commerce Clause of the Federal Constitution. On the other hand, if the order of the Commission, in the absence of federal legislation, would have been within the power of the Illinois Commerce Commission, the question still remains, in view of the enactment of the Natural Gas Act, as to whether the order is void and unconstitutional because it is repugnant to the statute which Congress has enacted. Consideration of this last question will be deferred until later in the argument.

The states cannot, under any guise, impose direct burdens upon interstate commerce nor may states regu-

late or restrain that which, from its nature, should be under the control of one authority and be free from restriction save as it is governed in the manner that the national legislature ordains. *Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed. 1511.

Cases in which state legislation and orders of state regulatory commissions have been held unconstitutional because the laws or orders were repugnant to the Commerce Clause of the Federal Constitution are legion. By far the largest percentage of such cases have perhaps involved questions of taxation. On the other hand, burdens upon and interference with the free and unobstructed flow of interstate commerce have frequently been held immune from attack upon constitutional grounds when they stemmed from the reserved police power of the states and did not constitute, in the face of congressional inactivity on the subject matter, such direct and immediate burdens upon interstate commerce as to fall within the class of subjects upon which states are forbidden to act by the Commerce Clause of the Federal Constitution. By the very nature of the inquiry, therefore, each case must stand or fall upon its own particular facts. The general principles seem clear; the application of these same principles to concrete situations frequently entails difficulties. The citation of adjudicated cases pro and con, while helpful, are rarely of themselves decisive of the question as to whether or not a particular state law or order is so direct and immediate in its burden upon interstate commerce as to be forbidden by the Commerce Clause of the Federal Constitution.

Recognizing the inherent limitation in the citation of cases on such subject, the appellant nevertheless quotes hereinafter from a few wherein the analogy to the present situation is close and persuasive.

In *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, 50 L. Ed. 1142, the railroad discontinued its practice of delivering cars destined for the Greensboro Ice & Coal Com-

pany upon the Ice and Coal Company's private siding. The consignee Ice and Coal Company applied to and secured from the North Carolina Corporation Commission an order directing the railroad to deliver cars destined to the Ice and Coal Company upon the company's private siding. In holding the order of the North Carolina Corporation Commission unconstitutional, Justice White, speaking for this Court, said:

> "Without at all questioning the right of the state of North Carolina in the exercise of its police authority to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the state or under its authority, which directly burdens interstate commerce, is a regulation of such commerce and repugnant to the Constitution of the United States.
>
> "Not being called upon to do so, we do not pass upon all the general regulations formulated by the Commission on the subject stated, but are clearly of opinion that the Court below rightly held that the particular application of those regulations with which we are here concerned was a direct burden upon interstate commerce and void. Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the corporation commission to so direct in a particular case, in favor of a given person or corporation, the order not only was in its very nature a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the act of Congress to regulate commerce and the amendments to that act, which forbid

and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce."

In *Houston & T. C. R.* v. *Mayes*, 201 U. S. 322, 50 L. Ed. 772, this Court held unconstitutional as a prohibited regulation of interstate commerce a Texas statute which penalized the failure of a railroad company to furnish cars to any shipper within a certain number of days after the shipper's request, in writing, and admitted of no excuse except such as might arise from strike or calamity. The Texas law "transcends," said this Court, the police power of the State of Texas.

In *Central of Georgia R. Co.* v. *Murphey*, 196 U. S. 194, 49 L. Ed. 444, the State of Georgia imposed upon the initial or any connecting carrier, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, the duty of tracing the freight and informing the shipper, in writing, when, where and how, and by which carrier, the freight was last damaged or destroyed and giving the names of the parties and their official positions, if any, by whom the truth of the facts set out in the information could be established. The statute was held, as applied to an interstate shipment, to constitute a violation of the Commerce Clause of the Federal Constitution. This Court said:

> "The power to regulate the relative rights and duties of all persons and corporations within the limits of the state cannot extend so far as to thereby regulate interstate commerce. The police power of the state does not give the right to violate any provision of the Federal Constitution."

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 67 L. Ed. 1117, there was involved the attempt by the State of West Virginia to give to her citizens a preferred right of purchase of natural gas over consumers in other states. In dealing with the question of interference with interstate commerce, this Court said:

"Of course, in the last analysis, the question is whether the enforced withdrawal for the benefit of local consumers is such an interference with interstate commerce as is forbidden to a state by the Constitution. The question is an important one; for what one state may do others may, and there are ten states from which natural gas is exported for consumption in other states. Besides, what may be done with one natural product may be done with others, and there are several states in which the earth yields products of great value which are carried into other states and there used. But, notwithstanding the importance of the question, its solution is not difficult. The controlling principles have been settled by many adjudications, some so closely in point that the discussion here may be relatively brief.

"By the Constitution, Article I, Section 8, Clause 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws, and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it.

* * * * * * *

"Natural gas is a lawful article of commerce and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs, or burdens such transmission, is a regulation of interstate commerce—a prohibited interference."

In each of the foregoing cases, the state law or state commission's order involved was hardly more direct or immediate in its effect upon interstate commerce than is the order of the appellee Illinois Commerce Commission upon appellant's activities in the present case. If the Illinois Commerce Commission can order appellant

to extend its facilities twenty miles and to supply appellee Central Illinois Public Service Company with natural gas for resale to the ultimate consumers within the community or communities served by said appellee, then it could do so as to other localities and in favor of other local distributing companies, thereby impairing the ability of both appellant and appellant's parent company, Panhandle Eastern Pipe Line Company, to meet their respective preexisting contractual obligations to sell and deliver natural gas—a commodity produced only in nature and limited in quantity—at wholesale to wholly independent local distributing companies for resale to the ultimate consumers. The burden imposed by the order of the Illinois Commerce Commission appears so direct and so immediate as to constitute, beyond any peradventure of doubt, a burden which, under the Commerce Clause of the Federal Constitution, is a prohibited one.

As was indicated by this Court in *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. Ed. 1027, the line of division between cases where, in the absence of congressional action, the state is authorized to act and those where state action is precluded by mere force of the Commerce Clause is not always clearly marked. But the Commerce Clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce. The transportation, sale and delivery of natural gas in the present case constitutes, in the language of the Barrett case,

> "* * * an unbroken chain, fundamentally interstate from beginning to end * * *. The paramount interest is not local, but national—admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of treatment among the various communities and states concerned."

In some of foregoing cases the enforcement of a wholesale selling price was held to place a direct burden upon interstate commerce inconsistent with the freedom of interstate trade which it was the purpose of the Commerce Clause to secure and protect. Surely it cannot be successfully contended that the order of the Illinois Commerce Commission imposes any less direct burden upon appellant's interstate activities than would the imposition of a wholesale selling price. The compulsory extension of appellant's facilities and the rendition by it of wholesale gas service interferes no less directly with its established course of business in Illinois than would a regulation by the Illinois Commerce Commission of its wholesale rates, which latter sort of regulation would, it seems, under the foregoing authorities, clearly constitute a violation of the Commerce Clause of the Federal Constitution.

IV.

The Order of the Illinois Commerce Commission Is Repugnant to and in Conflict with the Natural Gas Act.

If it be conceded that appellant is engaged in interstate commerce and that the order of the Illinois Commerce Commission imposes an unconstitutional burden upon such commerce in violation of the Commerce Clause of the Federal Constitution, all of which appellant asserts, then consideration of the effect of the Natural Gas Act upon such order would be wholly unnecessary to a finding by this Court that the order of the Illinois Commerce Commission is invalid and unconstitutional. But even if this Court were to take the view, as will be contended for by appellees, that the order of the Illinois Commerce Commission does not impose an unconstitutional burden upon appellant's business, assuming it to be interstate in character, and that the order, in the absence of Federal legislation embracing the regulation of interstate transportation and sale for resale of natural gas, is of such a nature and character as would have

been proper for the Illinois Commission to make, nevertheless such order still would be invalid and unconstitutional because it is in conflict with the Natural Gas Act. In short, the field of regulation of interstate transportation and sale of natural gas for resale was "occupied" by Congress, either wholly or partially, upon its enactment of the Natural Gas Act, so as to preclude the Illinois Commerce Commission from validly entering an order of the sort herein contested by appellant.

In 1938 Congress enacted 52 Stat. 821-833, 15 U. S. C. A., Secs. 717-717w, described therein as the "Natural Gas Act" in response to demands that the control and regulation of interstate transportation and sale of natural gas over which no regulatory body had theretofore successfully established any considerable degree of control, be confided to the Federal Power Commission in order to strengthen the hands of the state regulatory commissions in the regulation of purely local distributing companies.

Congress prefaced the Natural Gas Act with the following statement of the occasion for and the policy prompting its adoption:

> "Section 1(a). As disclosed in reports of the Federal Trade Commission, made pursuant to S. Res. 83 (70th Congress, First Session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

The mere circumstance that Congress has legislated upon the subject of interstate transportation and sale of natural gas does not, appellant concedes, *ipso facto* preclude state regulatory bodies, such as the Illinois Commerce Commission, from exercising any authority or con-

trol whatsoever over the interstate transportation of natural gas or the sale in interstate commerce of natural gas for resale for the uses and purposes specified in the Natural Gas Act unless it can be said that Congress has manifested, either expressly or by necessary implication, an intention that the jurisdiction and control of the Federal Power Commission, upon which Commission responsibility for the administration of the Act devolves, of such interstate transportation and sale of natural gas and over companies engaged therein shall be exclusive, leaving no room whatever for state action in the premises. If such is the intention of Congress to be inferred from the language of the Natural Gas Act, then the authority and jurisdiction of the Federal Power Commission is paramount and no state system or plan of regulation can be allowed to interfere with the unified and single control of the Federal Power Commission. The power of Congress in the field of interstate and foreign commerce is supreme under the Federal Constitution and once Congress has exercised that power by the enactment of legislation covering some phase of interstate commerce meant to be comprehensive and to embrace all activities of whatever sort or description within the field occupied by the legislation, then no state may properly interfere with or adopt auxiliary or complementary or supplemental legislation in the same field or do anything calculated to conflict with or frustrate the avowed purpose of Congress acting in the field in which its authority is second to none.

Whether Congress has as to any specific legislation manifested such an intention is not always a matter of ready or instant determination. Not infrequently, efforts have been made to attribute this effect to various acts of Congress, but in most instances such efforts have proved abortive on the ground that while Congress had the right to occupy the entire field, it actually circumscribed the regulation thereof and occupied only a limited portion of the field. In connection with the solution of this question, this Court said, in *Hines* v. *Davidowitz*, 85 L. Ed. 366:

"There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Appellant is of the opinion, however, that by the adoption of the Natural Gas Act, Congress has as the court said in the Davidowitz case, enacted a "complete scheme of regulation and has therein provided a standard * * * (which) states cannot, consistently with the purpose of Congress, conflict or interfere with, curtail or complement, the Federal law, or enforce additional or auxiliary regulations."

The Natural Gas Act provides in Section 1 (b):

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The Natural Gas Act further provides in Section 2 (6):

> " 'Natural Gas Company' means a person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale."

The Natural Gas Act also provides in Section 2 (7):

> " 'Interstate Commerce' means commerce between any point in a state and any point outside thereof or between points within the same state but through any place outside thereof, but only insofar as such commerce takes place within the United States."

The broad and comprehensive language of the Natural Gas Act, by which its provisions are made applicable to the interstate transportation of natural gas and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial and industrial, or any other use, and to natural gas companies engaged in such interstate transportation and sale of natural gas, the comprehensive character of the power vested in the Federal Power Commission to control and regulate the manifold activities of a natural gas company, and the congressional expression of public policy and necessity for the Act disclosed therein, all point strongly to the conclusion that while Congress welcomed the cooperation of the state commissions in the administration of the Act, it nevertheless intended to set up a unified system of control and regulation of natural gas companies that would brook no interference of any character from the Illinois Commerce Commission or any other similar state regulatory body insofar as regulation of or control of a natural gas company of the character defined in the Act is concerned.

That appellant is engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of such gas for resale for the uses and purposes indicated in the Natural Gas Act, and is, there-

fore, a "natural gas company" as defined in the Natural Gas Act, appears, from what has gone before, to admit of little doubt. If such be this Court's conclusion, then the invalidity and unconstitutionality of the order of the Illinois Commerce Commission directing appellant to extend its facilities and to require appellant to furnish natural gas at wholesale to appellee, Central Illinois Public Service Company, is established, and the claim of jurisdiction by the Illinois Commerce Commission over the subject matter of the order is no more than a usurpation of a power residing exclusively in the Federal Power Commission.

In *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Railway Co.*, 271 U. S. 246, 70 L. Ed. 928, it appeared that under the Constitution and Statutes of the State of Mississippi, a railroad corporation organized under the laws of that state had the right to "cross, intersect, join or unite its railroad with any other railroad heretofore or hereafter constructed at any points on their routes and upon the ground of such other railroad company with the necessary and proper turnouts, sidings, switches and other conveyances and * * * may exercise the right of eminent domain for that purpose." The Jackson & Eastern Railway Company instituted a proceeding under the state law to secure by eminent domain a state connection with the line of Alabama & Vicksburg Railway Company. The latter brought an equity suit to enjoin the former from pursuing the eminent domain proceeding. The Alabama & Vicksburg Railway Company asserted, among other grounds of relief, the claim that the Interstate Commerce Commission had exclusive jurisdiction over the establishment of junctions or physical connections between railroads engaged in interstate commerce and that the commission had not authorized the connection. This Court held:

> "Since then the authority of the Interstate Commerce Commission has been greatly enlarged and the

power of the states over interstate carriers correspondingly restricted * * * While none of the amendments in specific terms confer upon the commission exclusive power of physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question.

* * * * * * *

"It was not until Transportation Act * * * conferred upon the commission additional authority, that it acquired full power over connections between interstate carriers. By Sections 18-20 added to Section 1, it vested in the commission power to authorize constructions or extensions of lines although the railroad is located wholly within one state; and by Section 21 authorized the commission to require the carrier 'to extend its line or lines.'

* * * * * * *

"Over all these matters the Commission has exclusive jurisdiction.

* * * * * * *

"It is true that in this case the State Court found that the place selected for the junction was a proper one. But the power to make the determination, whether state action will obstruct interstate commerce, adheres in the United States as an incident to regulating such commerce. * * * Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment."

In *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539, the Court held that the question whether the Telegraph Company was or was not privileged in transmitting a message alleged to be libelous must be determined by uniform Federal rules. It stated that the Telegraph Company was subject to the Communications Act of 1934 and to the regulations thereunder by the Federal Communications Commission and significantly added:

"Congress having occupied the field by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges

and liabilities of telegraph companies in the transmission of interstate messages must be governed by uniform Federal rules."

In *Kentucky Natural Gas Corporation* v. *Public Service Commission of Kentucky et al.*, 28 F. Supp. 509, the Court said, in connection with the enactment of the Natural Gas Act:

> "Since the institution of the action, Congress has passed the Federal 'Natural Gas Act,' approved June 21, 1928, 15 U. S. C. A., Secs. 717-717w, committing to the Federal Power Commission the regulation of all matters relating to the transportation and sale of natural gas in interstate commerce.
>
> * * * * * * *
>
> "Congress has seen fit to exercise its authority over this particular type of commerce by the enactment of the Natural Gas Act. The Commerce Clause of the Constitution, U. S. C. A., Art. 1, Sec. 8, Clause 3, admits of no divided authority in the national field. 'Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule * * *' See *Currin* v. *Wallace*, 306 U. S. 1, 11, 59 S. Ct. 379, 385, 83 L. Ed. 441, and cases cited therein.
>
> * * * * * * *
>
> "My conclusion is that such local activities as are here shown to be present are insufficient to carry them into the field of state authority. Jurisdiction to regulate the business of the Complainant herein involved has been conferred by Congress upon the Federal Power Commission. Its authority is paramount and exclusive."

On appeal to the Circuit Court of Appeals, Sixth Circuit, the Kentucky Natural Gas Corporation case was affirmed (119 F. 2d 417) upon the conclusions announced in the District Court Judge's opinion. The Appellate Court said:

"From the findings of fact announced in the above cause by the District Court, and not challenged by the appeal, it clearly appears that the appellee is engaged solely in interstate commerce; that its interstate pipe lines from which gas is wholesaled under high pressure to distributing companies and utilities, is an interstate facility through which gas flows into Kentucky from other states and from Kentucky into other states; that as such it is not subject to the powers of the State Commission and is within the field of regulation now occupied by the federal government under the Federal Natural Gas Act of June 21, 1938, 15 U. S. C. A., Secs. 717-717w, committing to the Federal Power Commission the regulation of all matters relating to the transportation and sale of natural gas in interstate commerce; and

"It appearing to us that the opinion of the District Judge in *Kentucky Natural Gas Corporation* v. *Public Service Commission of Ky.*, (D. C.) 28 F. Supp. 509, so fully considers and so correctly disposes of the legal issues involved upon apposite and controlling authority, that the case should be and it is hereby affirmed upon the conclusions therein announced."

It appears that the overriding and paramount authority of Congress under the Federal Constitution has been asserted and established under the Natural Gas Act and that the State of Illinois and its instrumentality, the Illinois Commerce Commission, must acknowledge the superiority of Congress and its instrumentality, the Federal Power Commission, in all matters within the expressed or implied scope of the Natural Gas Act, over which Congress has manifested its intention that control and regulation shall be committed exclusively to Federal Power Commission. Upon the theory that the Natural Gas Act is an expression of Congress that the regulation of natural gas companies engaged in the transportation and sale of natural gas shall be exclusively vested in all respects in the Federal Power Commission to the total exclusion of state action, it would be unnecessary to determine whether the order of the Illinois Commerce Commission is of such

a nature and character as to be repugnant to and in direct conflict with some particular provision of the Natural Gas Act. The exact character and nature of the order of the Commission would then be immaterial for the reason that the intention of Congress, to use a hackneyed expression, to "occupy the field" to the total exclusion of the Illinois Commerce Commission would of itself strip the state commission of any power in the premises irrespective of the existence of a specific conflict between the order and some particular provision of the Natural Gas Act.

If it be conceded for the sake of argument, however, that Congress has not by the enactment of the Natural Gas Act adopted such a complete scheme of regulation as to forestall all state action in the field of regulation of interstate transportation, sale and delivery of natural gas, the order of the Illinois Commerce Commission nevertheless would be invalid and unconstitutional for the reason that it is directly repugnant to and in conflict with specific provisions of the Act. The order of the Illinois Commerce Commission is of a sort that cannot be reconciled with the Act, nor can the order and the Act consistently stand together. Appellant concedes that this Court insists, except in cases where Congress has enacted a scheme of total regulation, that before state regulations or the regulations of a state commission be felled as being in contravention of an Act of Congress, that such conflict and repugnance be so direct and positive that the two cannot be reconciled or consistently stand together.

The conflict between the order of the Illinois Commerce Commission and Section 7(a) of the Natural Gas Act (Appendix B) is direct and positive. If the order of the Illinois Commerce Commission is permitted to stand, the appellant may be said to be subject to the jurisdiction of two masters as to precisely the same subject matter. It is of little use for the appellees to argue

that the Natural Gas Act does not for every purpose exclude state action and that a natural gas company may be, therefore, subject to control by both State and Federal regulatory bodies, where, as in the present case, the particular subject matter of the order herein contested is unequivocally within the express purview and scope of the powers vested by the Natural Gas Act in the Federal Power Commission. Congress has authorized the Federal Power Commission to meet the public need in the particular matter in question involved in the order of the Illinois Commerce Commission. Priority as between the Illinois Commerce Commission and Federal Power Commission, as applied to the extension of facilities and the compulsory sale of natural gas ought not to be dependent upon the mere circumstance that the State Commission has first asserted jurisdiction in the premises. A fertile field for jurisdictional wrangles is presented unless the paramount and exclusive federal authority, established by the Constitution itself and voiced by Congress, in all respects in which the Natural Gas Act may expressly or impliedly regulate and control the interstate transportation and sale of natural gas, be sustained.

In *People ex rel. N. Y. C. R. Co.* v. *Public Service Comm.*, 233 N. Y. 113, 135 N. E. 195, the Court said:

> "The Interstate Commerce Commission is clothed with authority by the section quoted to compel carriers to afford reasonable and proper facilities for the interchange of traffic between their respective lines. * * * To sustain the order of the Public Service Commission in the instant case would necessarily establish that the two several commissions mentioned were clothed with jurisdiction to grant the relief sought and require us to ignore the well established principle of law that Congress having delegated to the Interstate Commerce Commission power to deal with the subject matter of this proceeding, an exercise of like power by the state is to be suspended."

In *Erie R. R. Co.* v. *N. Y.*, 233 U. S. 671, 58 L. Ed. 1149, the laws of the State of New York prescribed what should constitute a day's work for block system telegraph and telephone operators and signal men on railroads, the duration of which said day's work was less than the day's work prescribed by the Hours of Service Act of Congress, applicable to labor of interstate railway employees. This Court said:

> "The relative supremacy of the state and national power over interstate commerce need not be commented upon. Where there is conflict, the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulatory power of the state ceases to exist.
>
> * * * * * * *
>
> "We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be a division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it."

Again, in *Chicago, R. I. & P. R. Co.* v. *Hardwick Farmers Elev. Co.*, 226 U. S. 426, 57 L. Ed. 284, in which case laws of the State of Minnesota requiring railway companies to furnish freight cars on demand under penalty for each day's delay, not due to certain excepted causes, were under attack, and which said laws were claimed to conflict with a Federal law imposing a specific duty upon railway carriers to furnish cars upon reasonable request, this Court said:

> "The argument at bar has been primarily concerned with the question of the validity of the Minnesota statute, considered as having been enacted in the exercise of a power assumed to exist to legislate reasonably in the absence of action by Congress on the subject of the delivery when called for, of cars to be used in interstate traffic. Thus, counsel for the

defendant in error urges the correctness of the action of the Supreme Court of Minnesota in sustaining the statute, upon the hypothesis that Congress had not legislated on the subject, and that the act was a reasonable exertion of the power of the state. On the contrary, on behalf of the railroad company it is insisted that even upon the assumption that the state had power to deal with the subject for which the statute provides, in the absence of legislation by Congress, the enactment is nevertheless void, since it but expresses a policy which by penalization, fines, and forfeitures will substitute for a free and unrestrained flow of commerce a service favoring a particular locality and shippers within the confines of one state, to the disadvantage of others. We are not, however, called upon to test the merits of these conflicting contentions, since we are of opinion that by the act of June 29, 1906, known as the Hepburn Act, 34 Stat. at L. 584, Chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288, amendatory of the act to regulate commerce, Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act.

* * * * * * *

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the state over the subject matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress

destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the state impotent to deal with a subject over which it had no inherent, but only permissive, power. *Southern R. Co.* v. *Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. Rep. 140."

More recently, in the case of *Missouri Pacific Railway Co.* v. *Stroud*, 267 U. S. 404, 69 L. Ed. 683, wherein an effort was made to recover treble damages from the railroad under statute of the State of Missouri which prohibited any common carrier from making or giving any undue or unreasonable preference or advantage to any particular person in the transportation of goods, this Court said:

"Congress, in the exertion of its power over commerce among the parties, has enacted laws for the regulation of furnishing of cars to shippers. * * * It is elementary and well settled that there can be no divided authority of interstate commerce and that the Acts of Congress on that subject are supreme and exclusive. * * * The state law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce."

Not only does the order of the Illinois Commerce Commission, therefore, attempt to operate in a field already adequately occupied and filled by Federal legislation; it did in this instance compel the appellant to do that which has specifically been forbidden by the provisions of the Natural Gas Act without the explicit consent of the Federal Power Commission. The order of the Illinois Commerce Commission sought to compel the appellant to extend its facilities to a market in which natural gas was already being served by another company which was, apparently, a natural gas company within the meaning of the Natural Gas Act. Appellant could not legally have undertaken such extension of facilities under the Natural Gas Act, without first having applied for and secured from the Federal Power Commission a certificate

that the present or future public convenience and necessity require or will require such new construction or operation of such facilities and extensions thereof (Sec. 7 (c)—Appendix B). The record discloses that the Universal Gas Company, operating in the State of Indiana and receiving its supply of natural gas from the Kentucky Natural Gas Company, supplies appellee, Central Illinois Public Service Company, with natural gas for resale in Mattoon, Charleston, Effingham, Paris, and in a few smaller communities in Illinois; the point of delivery for all such gas being the point of connection between the facilities of Central Illinois Public Service Company and Universal Gas Company at the Illinois-Indiana state boundary line near Paris, Illinois (R. 42, 43). Under the Natural Gas Act a natural gas company may not legally invade the market of another natural gas company, absent some compelling reason therefor, and then only in the event the prior consent of Federal Power Commission is secured. The order of the Illinois Commerce Commission, therefore, in addition to being of a sort that would under any circumstances constitute a usurpation of power and prerogatives vested by Congress exclusively in the Federal Power Commission, in this particular instance is coercive in the extreme for the reason that the invasion of the market of the Universal Gas Company by appellant, which the order of the Illinois Commerce Commission seeks to compel the appellant to do, would result, upon appellant's compliance with the order of the Illinois Commerce Commission, in appellant's incurring the likelihood of penalties under the Natural Gas Act, by which Act Congress has delegated exclusive authority to Federal Power Commission to determine the necessity for and the advisability of such action. If this Court were to vouchsafe concurrent jurisdiction to the Illinois Commerce Commission in the matter of determination of the necessity for extension of facilities and the sale of natural gas under the circumstances disclosed by the order of the Illinois Commerce Commission, this

appellant would be placed in the unhappy position of having to serve two masters, as to precisely the same subject matter. If such concurrent authority is possessed by the Illinois Commerce Commission, then the Natural Gas Act would effectively be emasculated and the paramount power of Congress in the field of interstate transportation of natural gas would be frustrated. That such result could not reasonably be the one contemplated or intended by Congress appears self-evident. As a matter of fact the very necessity and basis for the enactment of the Natural Gas Act would be removed at one fell swoop for it was upon the very assumption that the power of the state regulatory bodies did not embrace the activities of a natural gas company transporting natural gas in interstate commerce and that, therefore, the regulation of purely local distributing companies receiving their gas supply from such interstate natural gas companies was rendered more difficult and less effective by reason of the lack of control of state regulatory bodies over such natural gas companies, that the Natural Gas Act was sponsored by state regulatory commissions themselves. Illustrating the attitude of the state regulatory commissions in this connection is a resolution adopted by the National Association of Railroad and Utilities Commissions, adopted in 1935 and presented at a hearing before the sub-committee of the committee on interstate and foreign commerce of the House of Representatives, 74th Congress, second session, in connection with its consideration of H. R. 11662, a forerunner to the present Natural Gas Act, which resolution ran as follows:

> "Whereas, the business of transmission and sale of gas in interstate commerce at wholesale for resale, under decisions of the Supreme Court of the United States, is not subject to regulation by the states and, in absence of Federal legislation provided therefor, is left wholly unregulated; and
>
> "Whereas, jurisdiction to regulate such business should be vested in some tribunal so that gas supplied

to distributing companies in interstate commerce may be obtained at just and reasonable prices: Therefore be it

"RESOLVED, That this association favors the enactment by Congress of legislation vesting jurisdiction in some one of the existing Federal regulatory commissions to regulate the service of supplying gas, whether artificial or natural, produced in one state and sold at wholesale to a distributing company in another state, including rates applicable to such service; and be it further

"RESOLVED, That Congress be asked to limit the jurisdiction granted strictly to gas transmitted and sold at wholesale for resale, and that such legislation be so drawn as in no way to limit or impair the power of the states to regulate intrastate and local service and the rates applicable thereto; and be it further

"RESOLVED, That the committee on legislation be directed to present this resolution to the chairman of the appropriate committees of the two Houses of Congress and to support the passage of such legislation."

It is apparent, therefore, that if an order of the sort promulgated by the Illinois Commerce Commission is upheld the raison d'etre of the Natural Gas Act very largely ceases to exist and the Federal Power Commission would be relegated to a subordinate and subservient position—quite the contrary from that obviously intended by Congress and even sought by the regulatory bodies.

Conclusion.

It is submitted that the challenged order of the Illinois Commerce Commission and the Illinois Commerce Commission Act under which said order purports to have been made, as applied to appellant, and as construed by the State Court, impose upon appellant's interstate activities, a direct burden in contravention of the Commerce

Clause of the Federal Constitution and are in direct and positive conflict as so construed and applied, with the provisions of the Natural Gas Act, and that said statute and order made thereunder as so construed and applied to appellant are unconstitutional and void. The judgment of the Court below should be reversed.

Respectfully submitted,

GLENN W. CLARK,
RUSSELL VOERTMAN,
Kansas City, Missouri,
ALBERT C. SCHLIPF,
Springfield, Illinois,
Counsel for Appellant.

APPENDIX "A."

Illinois Commerce Commission Act, Chapter 111 2/3, Illinois Revised Statutes, 1939.

Section 50.

"ADDITIONS, IMPROVEMENTS AND NEW STRUCTURES-JOINT CONSTRUCTION. §50. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements or changes, or any new structure or structures which the Commission has ordered to be erected, require joint action by two or more public utilities, the Commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at the joint cost whereupon the said public utilities shall have such reasonable time as the Commission may grant within which to agree upon the apportionment or division of cost of such additions, extensions, repairs, improvements or changes or new structure or struc-

tures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structure or structures, the Commission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured."

APPENDIX "B."

Natural Gas Act, 52 Stat. 821-833, 15 U.S.C.A. 717-717w. Section 7.

"EXTENSION OF FACILITIES: ABANDONMENT OF SERVICE. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: Provided, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

"(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained. After due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future pub-

lic convenience or necessity permit such abandonment.

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: Provided, however, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest."